INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	5
Argument	7
Conclusion	11

CITATIONS

Cases:

Corn Products Refining Co., v. *Federal Trade Commission*, No. 680, October Term, 1944 10

Federal Trade Commission v. *Staley Mfg. Co.*, No. 559, October Term, 1944 10

Helvering v. *Gowran*, 302 U. S. 238 9

Indianapolis v. *Wheeler*, 318 U. S. 781 9

Securities and Exchange Commission v. *Chenery*, 318 U. S. 80 9

Statute:

Clayton Act, Section 2, 38 Stat. 730, as amended by the Act of June 19, 1936, 49 Stat. 1526, 15 U. S. C. 13 ..... 2, 8, 9

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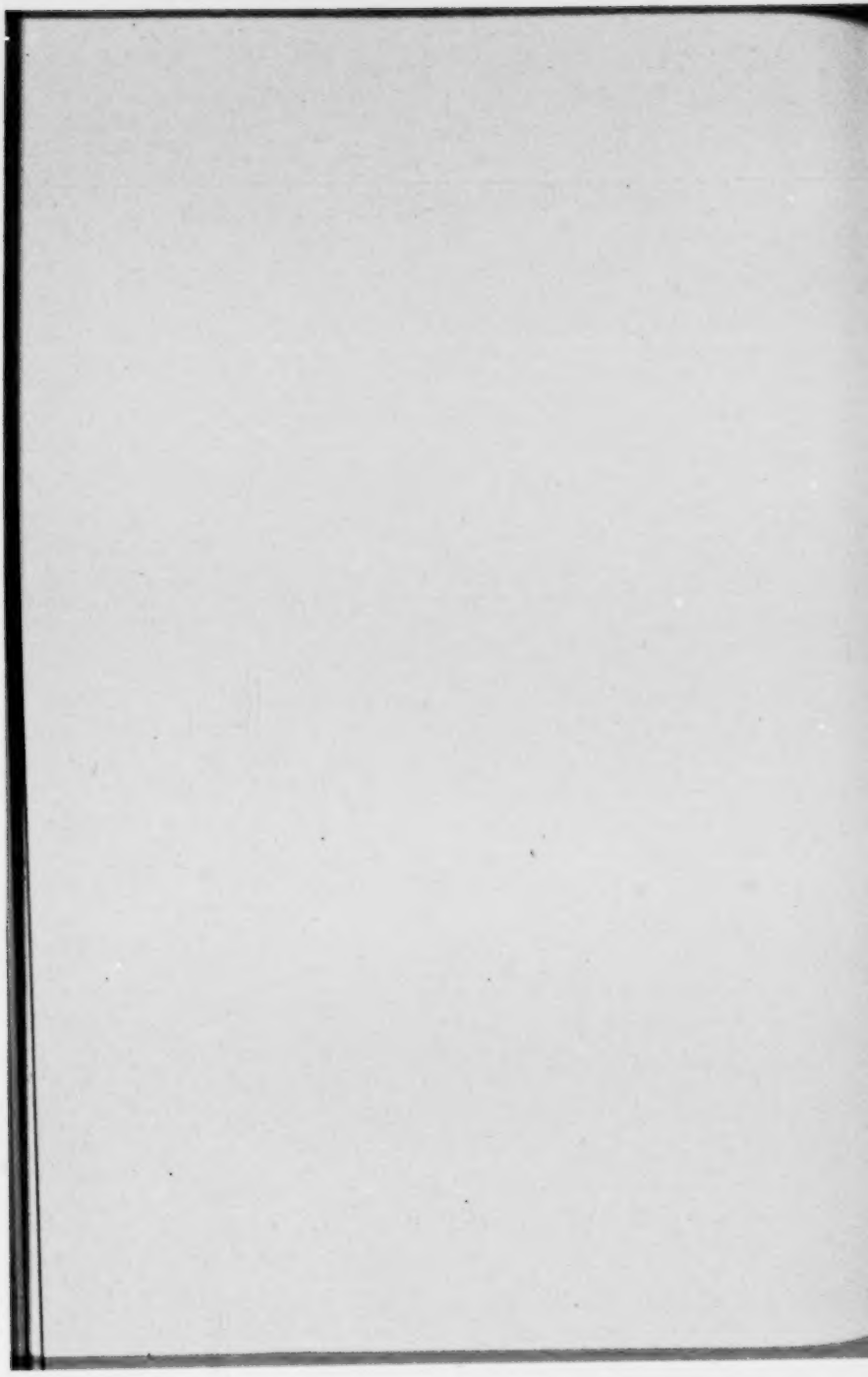

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 230

SAMUEL H. MOSS, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 424) is reported in 148 F. 2d 378.

JURISDICTION

The decree of the Circuit Court of Appeals was entered April 17, 1945 (R. 429). The petition for a writ of certiorari was filed July 14, 1945. The jurisdiction of this Court is invoked under Section 11 of the Clayton Act, 32 Stat. 734, 15 U. S. C. 21, and Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

(1) Whether the evidence supports the findings of the Federal Trade Commission that petitioner's discriminations in price between different purchasers of its rubber stamps did, or tended to, substantially lessen competition with petitioner in the sale of rubber stamps and otherwise injure, destroy or prevent such competition.

(2) Whether the justification of price discrimination permitted by Section 2 (b) of the Clayton Act, that the discriminator's lower price was made in good faith to meet the equally low price of a competitor, can be established without showing any sale by a competitor at as low a price as the lower price of the price discriminator.

(3) Whether a ruling by the Commission excluding evidence offered by petitioner constitutes reversible error.

STATUTE INVOLVED

Section 2 (a) and (b) of the Clayton Act, 38 Stat. 730, as amended by the Act of June 19, 1936, 49 Stat. 1526, 15 U. S. C. § 13, provides:

> (a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption,

or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however,* That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further,* That nothing herein contained shall prevent persons en-

gaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further,* That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

STATEMENT

The Federal Trade Commission brought this proceeding under Section 11 of the Clayton Act charging petitioner with violating Section 2 of that Act as amended by the Robinson-Patman Act of June 19, 1936. The case was heard on stipulated facts (R. 12–16, 35–38, 269–274) and on oral evidence taken on behalf of both the Commission and petitioner. On the basis of this evidence the Commission made findings of fact of which the following are pertinent:

Petitioner manufactures made-to-order rubber stamps which it sells to customers in various States in substantial competition with other vendors of such stamps and in the course of such commerce it sells goods of the same grade and quality to some customers at lower prices than it sells them to others (R. 19–20).

Typical of such price discriminations are sales of made-to-order stamps, three inches in length and 3/8 inches in height, made to eight concerns (counting separately the sales to Linde Air Products Co. at Chicago and to it at San Francisco). In each case petitioner's price was below prices which it was charging to other purchasers, and was substantially lower than the price at which a competitor had been previously selling to the company receiving the benefit of petitioner's discriminatory price and operated to divert the trade of the favored purchaser from such competitor (R. 21–26). One competitor, whose sales to the

General Electric Company had been 90% of the competitor's business, was unable to meet petitioner's price to General Electric, a price below the cost of manufacture, and was forced to discontinue its rubber stamp business (R. 26).

The range of petitioner's prices in concurrent sales of such three-inch stamps was wide even among the favored purchasers, as shown by the following (R. 26–27):

Customer	Price first line	Price each additional line
General Electric Co.	4¢	1¢
New York, New Haven & Hartford Railroad	4¢	4¢
Prudential Insurance Co.	6¢	2¢
Oxweld Acetylene Co.	10¢	7¢
Linde Air Products Co.	10¢	7¢
American Airlines Inc.	13¢	13¢
New Britain National Bank [1]	15¢	10¢

[1] Petitioner's sales to this company continued until the end of 1938 or the early part of 1939 (R. 25) and were concurrent only as to some of the other companies listed.

Petitioner concurrently sold stamps of the same size and quality to other purchasers at prices, for the first line, of 5¢, 7¢, 8¢, 15¢, 20¢ and 30¢, plus a charge for each additional line (R. 27).

Petitioner's price differences were material and their effect was and may be substantially to lessen competition with petitioner and to otherwise injure, destroy or prevent such competition (R. 27). Petitioner's lower prices were not made in good faith to meet an equally low price of a competitor and there was no evidence that petitioner's differences in price were based upon differences in cost resulting from the differing

methods or quantities in which its rubber stamps were sold or delivered to various purchasers (R. 27–28).

The Commission concluded that petitioner was violating Section 2 (a) of the Clayton Act and it entered an order directing petitioner to cease and desist from unlawful discrimination in prices in the interstate sale of its rubber stamps (R. 28–29, 31–32).

The court below affirmed the Commission's order in a *per curiam* opinion. The court held that the evidence warranted the Commission in finding that petitioner's discriminations in price had effects on competition which under the provisions of Secton 2 (a) of the Clayton Act, made the discriminations unlawful; that petitioner, having offered no evidence that a competitor had in any instance sold to any of petitioner's favored purchasers at a price as low as petitioner's price to such purchaser, had failed to establish the defense to price discriminations permited by Section 2 (b) of the Act, that the discriminator's lower price was made in good faith to meet an equally low price of a competitor; and that no injustice had been done by the Commission's rejection of certain evidence, not shown to be relevant, offered by petitioner (R. 425–427).

ARGUMENT

1. The court below apparently interpreted the Act as meaning that upon mere proof by the

Federal Trade Commission that a respondent before the Commission had sold to two customers at different prices, he has the burden of affirmatively proving that the discrimination did not lessen competition or tend to injure or prevent it (R. 425). Although a respondent undoubtedly has the burden of proving the various justifications listed in the provisos in Section 2 (*supra*, pp. 3–4), the Commission has always construed the Act to require it as part of its affirmative case to present evidence that a discrimination may lessen or tend to injure competition. The petition for certiorari correctly states (pp. 15–16) that the Commission's argument in the court below "was not that respondent [petitioner here] had failed to prove affirmatively that the discriminations did not lessen competition but that it, the Commission, had proved that the discriminations 'injured competition' ". In seemingly attributing a different position to the Commission, the court below apparently misunderstood the Commission's argument.

Nevertheless, the decision below is clearly right for the reasons advanced by the Commission. The Commission introduced evidence showing that the discriminatory prices charged by petitioner—ranging from 4 to 30 cents for the same product (R. 36–37)—diverted business from competitors (R. 269–274) and forced at least one competitor out of business (R. 192–200). The Commission made findings of fact to this effect (R. 26–28) which are unchallenged, and concluded that the

effect of the price discrimination was substantially to lessen competition with petitioner and to injure and prevent such competition (R. 27–28). If, as assumed by both parties in the court below and in this Court, the burden of introducing evidence as to this element of the offense rests on the Commission, the evidence described fully satisfies the statutory requirement.

Since the result reached by the court below is right under the construction of the statute urged by petitioner and applied by the Commission, there is no occasion for further review in order to determine what in this case is an academic question. A judgment will not be disturbed because "the lower court relied upon a wrong ground or gave a wrong reason". *Helvering* v. *Gowran,* 302 U. S. 238, 245, and cases cited; *Securities and Exchange Commission* v. *Chenery Corp.,* 318 U. S. 80, 88. And see the denial of certiorari in *Indianapolis* v. *Wheeler,* 318 U. S. 781.

2. Section 2 (b) of the Clayton Act authorizes a seller to justify a price discrimination by showing that his lower price was made in good faith to meet the equally low price of a competitor. Petitioner urges (Pet. 17) that the case presents the important question of whether this defense is made out by proof that the seller's lower price was in response to verbal statements from buyers that competitors were quoting equally low or lower prices and in anticipation of their com-

petition.[1] This Court settled such question adversely to petitioner in *Federal Trade Commission* v. *Staley Mfg. Co.*, No. 559, October Term 1944, slip op. 9–11, and in *Corn Products Refining Co.* v. *Federal Trade Commission*, No. 680, October Term, 1944, slip op. 11. In so far as the *ratio decidendi* of the court below differs from the foregoing later decisions by this Court, the latter will be a guide to the court below in future cases involving defenses under Section 2 (b).

3. Petitioner contends (Pet. 17–19) that the court below erred in sustaining the action of the Commission in excluding certain evidence offered by petitioner in support of its defense under Section 2 (b). The Commission's examiner refused to allow petitioner's counsel to question the officer of a competitor (operated by two persons who had been employees of petitioner 14 years earlier) as to whether this company had competed with petitioner for the business of certain companies to which petitioner sold at discriminatory prices (R. 293–299). We submit that the testimony sought to be elicited was properly ruled to be irrelevant. Since it

[1] The question of establishing a defense under Section 2 (b) by proof that the lower price was offered in a sealed bid, referred to by petitioner, is not presented. The opinion below does not discuss this question and it is irrelevant since petitioner offered such proof (R. 337–338) as to only one of the numerous instances of discriminatory prices shown by the evidence.

had no tendency to show that petitioner had knowledge of the competitor's prices or that they were as low as petitioner's lower discriminatory prices, it would not tend to show that petitioner's lower prices were made "in good faith" to meet the equally low prices of a competitor. In any event, a purely evidentiary ruling presents no general question of law meriting review by certiorari.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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